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No. 14

In the Supreme Court of the United States

OCTOBER TERM, 1930

WILLIAM A. SHERMAN, M. F. COCHRANE, AND J. B. SANFORD, CONSTITUTING THE BOARD OF STATE HARBOR COMMISSIONERS OF THE STATE OF CALIFORNIA, ETC.

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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v.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by either the United States Circuit Court of Appeals for the Ninth Circuit or by the United States District Court for the Northern District of California.

JURISDICTION

The certificate of the Circuit Court of Appeals was filed in this Court November 19, 1929. On May 5, 1930, this Court granted a joint motion for a writ

of certiorari to bring up the entire record and cause. (R. 58.)

Jurisdiction of this Court is conferred by Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The questions presented on the entire record are essentially the same as those certified. These questions are:

1. Whether the State Belt Railroad, hereinafter described, is a common carrier engaged in interstate commerce within the meaning of the Federal Safety Appliance Act.

2. Whether the suit against appellants (below) is a suit against the State of California and, if not, whether appellants, as the operators of the State Belt Railroad, are liable for violations of the Federal Safety Appliance Act committed in the operation of that railroad.

3. Whether, if this is a suit against the State of California, the Federal Safety Appliance Act applies to the operations of the State Belt Railroad and gives the United States District Court jurisdiction of the suit.

STATUTES INVOLVED

The applicable statutory provisions are set forth in Appendix A, pp. 36–39, *infra*.

STATEMENT

This action was brought by the United States in the District Court against the members of the

Board of State Harbor Commissioners of the State of California (sometimes hereinafter referred to as appellants), as operators of the State Belt Railroad, to recover statutory penalties for violations of the Federal Safety Appliance Act and the Supplemental Act of April 14, 1910.

The complaint alleged nine separate violations of the Act by the appellants, all in the month of October, 1925. (R. 2–12.) The first and third causes of action alleged two separate violations of the order of the Interstate Commerce Commission, dated October 10, 1910 (Appendix B, pp. 39–40, *infra*), made pursuant to the third section of the Act of April 14, 1910 (p. 38, *infra*), which required that the minimum height of drawbars for freight cars on standard-gauge railroads should be 31½ inches. The second, fourth, fifth, eighth, and ninth causes of action alleged five separate violations of Section 2 of the Safety Appliance Act of 1893, as amended by Section 1 of the Act of March 2, 1903 (pp. 36–37, *infra*), which made it unlawful for any common carrier engaged in interstate commerce to haul cars on its line not equipped with couplers coupling automatically by impact. The sixth and seventh causes of action alleged two separate violations of Section 2 of the Act of April 14, 1910, which requires that all cars shall be equipped with efficient hand brakes (p. 38, *infra*).

A jury trial having been waived in writing, the case was tried on stipulated facts (R. 24–40) and judgment was entered for the United States for

$900, being the statutory penalty of $100 for each of the nine separate violations of the Act (R. 22–23). Upon appeal to the Circuit Court of Appeals certain questions of law were certified to this Court. (R. 57–58.) Thereafter this Court granted a joint motion to bring up the entire record and cause. (R. 58.)

The stipulation of facts recites the testimony bearing upon the violations of the Safety Appliance Act alleged in the complaint which witnesses for the Government and for the State Belt Railroad would give if called. (R. 34–39.) The certificate of the Circuit Court of Appeals states (p. 5):

> Further facts are stipulated in respect to the specific alleged violations from which it appears that if what was done and omitted had been done or omitted by an ordinary common carrier engaged in interstate commerce such acts and omissions would admittedly constitute violations of the Safety Appliance Act.

The physical facts with respect to the State Belt Railroad are stated in the certificate of the Circuit Court of Appeals substantially as follows (pp. 2–4): The railroad is located wholly within the city of San Francisco and is about five miles in length. It is near the San Francisco harbor and runs approximately parallel with the water front, between wharves on one side and numerous industrial plants on the other. The railroad has physical connections with the tracks of the Southern Pacific Railroad

Company from which it receives and to which it delivers cars. Short spurs connect the State Belt Railroad with the industrial plants, which are approximately 175 in number, and the wharves, of which there are 45. The wharves are owned by the State of California and used by the freight-car ferries of the Southern Pacific Company, the Atchison, Topeka and Sante Fe Railway Company, the Western Pacific Railway Company, and the Northwestern Pacific Railway Company, all common carriers engaged in interstate commerce.

Adjacent to the main line of the State Belt Railroad and connecting therewith are certain freight yards of the four interstate carriers, owned by the State of California but used by the carriers under lease or agreement. In these yards all the switching is done by the State Belt Railroad, and all cars going into and out of these yards are hauled by that railroad. None of the tracks of the State Belt Railroad, either main or spur, is ever used by any of the interstate carriers above named, and no locomotive other than the locomotives of the State Belt Railroad ever moves on any part thereof. The railroad has no cars or other rolling stock except locomotive engines.

With reference to the movement of freight cars on the line of the State Belt Railroad, the stipulation states (R. 29–31):

> That one hundred and seventy-five (175) industries and forty-five (45) wharves and car ferries referred to are served exclusively

by the State Belt Railroad, in so far as the movement of loaded and empty cars are concerned. The State Belt Railroad moves all carload freight from these industries and wharves destined and consigned to points both within and without the State of California, either on or beyond the lines of the four interstate carriers. It likewise receives from these four carriers, carload shipments of freight, originating within and without the State of California and destined and consigned to industries on the line of the State Belt Railroad, and delivers same to the consignees. It also delivers to the various steamship lines using the forty-five (45) wharves in question, cars, loaded and unloaded, for delivery to the carrier railroads, and likewise receives cars from such carrier roads for delivery to such wharves, for further transportation to points within and without the State of California. The State Belt Railroad also moves over its lines all cars, loaded and empty, between the yards of the four railroads referred to and the various wharves and transfer tracks heretofore mentioned. These last-mentioned cars are either for shippers or consignees who do not have industrial tracks or private sidings of their own, who obtain cars and load them themselves, and hire the State Belt Railroad to transport such cars either to the carrier roads or along the water front as the case may be. These cars are loaded by shippers before the State Belt Railroad switches the same and are un-

loaded by the shippers after the State Belt Line spots them for unloading. No freight is ever loaded or unloaded by said State Belt Railroad. Of all the cars and movements mentioned herein, no discrimination is made between cars owned by railroads operating within the State of California and those operating wholly without. The State Belt Railroad moves all cars offered to it by the railroads in question, the various steamship lines using the forty-five (45) wharves, and the one hundred and seventy-five (175) industries referred to. The cars used by the steamship companies are turned over to the State Belt Railroad for hauling in the same manner that cars are received from the carrier roads, i. e., the cars are furnished by the steamship companies and are committed to the State Belt Railroad for the movement requested and for no other purpose. For such services performed for the steamship companies in hauling said last-mentioned cars, the usual switching charge is made just as in the matter of cars received from, and delivered to, carrier roads. The State Belt Railroad also moves between the Presidio and the steamship docks, car-ferry wharves and transfer tracks heretofore mentioned, cars originating without the State of California and consigned to the Presidio, or *vice versa.*

The State Belt Railroad is not a party to any through rate for the transportation of any shipment but charges a flat rate for moving cars over

its line. (R. 31.) It does not move shipments on through waybills, nor does it issue any waybill or give any receipt whatever, but cars are moved by it on so-called "switch lists." (R. 31–32.)

Switch lists are made out, in the case of inbound freight shipments, by the carrier or steamship line, and show the number and initials of the car, whether loaded or empty, and points of delivery or final destination on the State Belt Line. The original waybill is retained by the carrier delivering the car to the State Belt Railroad. The transportation charge for the movement by the State Belt Railroad is absorbed by the carrier from whom the car is received. On outbound shipments the switch list is made out by an agent of the carrier to whom the car is to be delivered by the State Belt Railroad, and shows the number and initials of the car, whether loaded or empty, and the name of the shipper. Concurrently with the making of such switch list, the agent of the carrier, having received a shipping order from the consignor, makes out and delivers to the carrier a waybill showing, in addition to the things heretofore mentioned, the consignor, the point of origin as San Francisco, and the ultimate destination of the car. The car is then moved on the switch list by the State Belt Railroad to the carrier road, which transports it to its destination. If a car is moved between two points on the State Belt Line without delivery to any other carrier, it collects the switching charge from the

individual or industry requesting such movement. (R. 32–33.)

A large majority of the daily movements over the State Belt Railroad for the year ending December 30, 1925, were carload shipments of freight, (*a*) originating in States other than California and destined to consignees on the State Belt Railroad, or (*b*) originating on the State Belt Railroad and destined to consignees in States other than California. Many of the cars so handled during this period both originated in and were destined to points in States other than California. A considerable portion of the traffic so handled by it originated in or was destined to foreign countries. (R. 33.)

The State Belt Railroad is operated by the State of California for the purpose of facilitating commerce of the Port of San Francisco, without any profit being derived therefrom. The charges made for the services rendered by the line are made pursuant to the authority conferred by Section 2524 of the Political Code of California, which authorized collection of such an amount of revenue as would enable the appellants to perform the duties required of them by Article IX of the Political Code. (R. 34.)

The appellants were appointive State officers and constituted what under the State statutes was designated as the Board of State Harbor Commissioners. As such officers appellants had charge of

the administration of the Harbor of San Francisco and, in connection therewith, the administration of the State Belt Railroad, at the time during which the violations of the Federal Safety Appliance Act were alleged to have occurred. (R. 24–25.) They did not personally operate or immediately supervise the operation of the railroad. (R. 26, 28.)

All revenue received for services rendered by the State Belt Railroad is paid to the Board of State Harbor Commissioners. (R. 25.) The State laws provide that all moneys so collected shall be paid into the State Treasury at least once each month, and be credited to the San Francisco Harbor Improvement Fund, except so much thereof as may be necessary to pay specified operating expenses, including salaries and "incidental expenses." (R. 25–26.) All other sums of money paid by the Commissioners are paid by warrants drawn by the State Controller against any money in the State Treasury credited to the Harbor Improvement Fund. (R. 26.)

The State Belt Railroad is operated under the immediate supervision of a superintendent, who is appointed and holds office at the pleasure of the Board of State Harbor Commissioners and is under the supervision and control of that Board. (R. 26.) The inspectors, engineers, and yardmen employed in the operation of the State Belt Railroad are, except in cases of emergency employment,

civil-service employees of the State. (R. 26.) The inspectors in certain cases repair cars found to be defective under the requirements of the Federal Safety Appliance Act, and it is their duty to inspect all appliances covered by that Act. (R. 27.) Appellants did not personally participate in nor did they have any personal knowledge of the commission of the alleged violations of the Safety Appliance Act, and such violations, if any, occurred contrary to their orders and instructions. (R. 28.)

Prior to the trial and judgment in this case appellants had ceased to be State Harbor Commissioners and had been succeeded by new appointees. (R. 24, 40.)

SUMMARY OF ARGUMENT

I. The Safety Appliance Act and Supplemental Act of April 14, 1910, apply to "any common carrier engaged in interstate commerce by railroad." The State Belt Railroad is such a common carrier. It acts as a belt railroad connecting freight yards used by four interstate railroads with wharves on the San Francisco water front served by numerous interstate steamship lines. It accepts and transports all carload freight offered to it for movement between the railroad lines and the wharves, and vice versa. It also acts as a terminal company performing an essential part in the through interstate shipment of goods. It accepts and transports all carload freight moving to or from many industries

located along its line and originating on or destined to the lines of the connecting railroads. A large part of the freight transported by it originates in or is destined for States other than the State of California. The fact that the State Belt Railroad does not issue through bills of lading or that its property is owned by the State of California does not prevent it from being a common carrier engaged in interstate commerce. Its character as such a carrier is determined by the nature of its operations.

II. The suit against appellants to recover fines imposed under the Safety Appliance Act and Supplemental Act for permitting the movement in interstate commerce of cars with equipment not conforming to the standards prescribed by those Acts is not a suit against the State of California. That State did not and could not authorize appellants, as members of the Board of State Harbor Commissioners operating the State Belt Railroad, to violate laws of the United States regulating interstate commerce. The judgment against appellants did not require for its satisfaction any relief against the State; when the judgment was entered appellants no longer held office as State Harbor Commissioners.

Appellants were in law and in fact the operators of the State Belt Railroad and they were therefore within the term "common carrier" as used in the Safety Appliance Act. *United States* v. *Nixon*,

235 U. S. 231. It is no defense that the violations of the Act charged against appellants occurred without their knowledge or personal participation since the Act imposes an absolute liability on carriers subject thereto. Liability for a violation of the Act is not dependent upon proof of actual or imputed negligence.

Under the power to regulate interstate and foreign commerce, Congress may fine or penalize officers of a State for acts occurring while said officers are engaged in interstate commerce.

III. If the suit is in substance an action against the State of California, the rule of statutory construction that a statute does not apply to the sovereign unless expressly named therein is inapplicable because the limitations of this rule apply only to the *enacting sovereign*.

Even if the suit is against the State of California, the Safety Appliance Act gave the District Court jurisdiction. The original jurisdiction of cases in which a State is a party given to this Court by Article III, Section 2, Clause 2, of the Constitution is not exclusive. *Ames* v. *Kansas,* 111 U. S. 449. The specific provisions of Section 6 of the Safety Appliance Act giving United States District Courts exclusive jurisdiction of all suits to enforce the penalties therein provided modified the general provisions of Section 233 of the Judicial Code vesting, with some exceptions inapplicable here, exclusive jurisdiction in this Court of suits in which a State is a party.

ARGUMENT

I

THE STATE BELT RAILROAD IS A COMMON CARRIER ENGAGED IN INTERSTATE COMMERCE WITHIN THE MEANING OF THE SAFETY APPLIANCE ACT AND THE SUPPLEMENTAL ACT OF APRIL 14, 1910

Section 1 of the Safety Appliance Act (p. 36, *infra*) makes that Act applicable to "any common carrier engaged in interstate commerce by railroad." Section 1 of the Supplemental Act of April 14, 1910, makes that Act applicable to every common carrier subject to the Safety Appliance Act.

There seems little doubt that the State Belt Railroad is a common carrier. It runs along the San Francisco water front, connecting with approximately 45 wharves on one side and approximately 175 industrial plants on the other. It connects with the freight yards used by four railroads engaged in interstate commerce. It moves over its line all cars offered it by the four railroads, the steamship lines using the wharves, and the 175 industrial plants upon its lines. It transports all carload freight originating on the lines of the four connecting railroads or received by them from points beyond their lines and destined to either the industries or wharves along the State Belt Railroad. It likewise moves all carload freight from these industries and wharves destined to points on or beyond the lines of the four railroads. The industries and wharves in question are served exclusively by the State Belt Railroad. (*Supra*, pp. 4–9.)

The State Belt Railroad is a common carrier because it holds itself out as a link in the through transportation of freight carried by the railroads and the steamship companies which the State Belt Railroad connects. Such a belt line serving other common carriers and accepting all shipments offered is itself a common carrier. *Belt Railway Company of Chicago* v. *United States,* 168 Fed. 542 (C. C. A. 7th). In that case, as in this, the belt railroad made a freight charge per car which it collected from the railroads for which the services were rendered. It issued no bills of lading, did not participate in any through freight rates, and had no dealings with shippers.

The State Belt Railroad, in addition to functioning as a common carrier in its capacity as a belt railroad, also functions as a common carrier in its capacity as a terminal company serving the industries located on its line. It therefore falls within the decision of this Court in *United States* v. *Brooklyn Eastern District Terminal,* 249 U. S. 296, holding that a terminal company performing a switching service within the limits of a city between its docks and its team tracks and freight houses is a common carrier engaged in interstate commerce by railroad within the meaning of the Hours of Service Act. In that case as in this the terminal company did not own any of the cars which it hauled by its own locomotives and train

crews and it was paid for its services not by the shipper or consignee but by the railroad or steamship company for whose account the transportation service was performed.

Appellants attempt to distinguish this case on the ground that a greater transportation service was furnished by the Brooklyn Terminal Company than is furnished by the State Belt Railroad. The chief ground for such a distinction would seem to be that the Brooklyn Terminal Company issued through bills of lading, while the State Belt Railroad did not. But this could not have been considered a controlling factor since the Court referred to *Belt Railway Company of Chicago* v. *United States, supra,* as supporting its decision and, as previously stated, no through bills of lading were issued by the railroad there involved. Furthermore, in *United States v. Union Stock Yard* , 226 U. S. 286, this Court held that a stockyards company and a junction railroad connecting the stockyards with interstate common carriers, when both were held in common ownership, constituted common carriers by railroad engaged in interstate commerce and subject to the jurisdiction of the Interstate Commerce Act, although neither the stockyards company nor the junction railroad issued bills of lading. The Court said (p. 305):

> They are common carriers because they are made such by the terms of their charters, hold themselves out as such and constantly act in that capacity, and because they are so

treated by the great railroad systems which use them. In *Union Stock Yards Co.* v. *United States,* 169 Fed. Rep. 404, Mr. Justice Van Devanter (while a Circuit Judge), speaking for the Court of Appeals, said (406):

> "* * * And it is of little significance that the stockyards company does not hold itself out as ready or willing generally to carry livestock for the public, for all the railroad companies at South Omaha do so hold themselves out, and it stands ready and willing to conduct, and actually does conduct, for hire a part of the transportation of every livestock shipment which they accept for carriage to or from that point, including such shipments as are interstate."

That the State Belt Railroad is not only a common carrier, but that it is engaged in interstate commerce is evident. It is admittedly a necessary connecting link in the through transportation of goods shipped in interstate and foreign commerce. (R. 29–31, 33.) In *Western Oil Refining Company* v. *Lipscomb,* 244 U. S. 346, 349, this Court said:

> Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one State to another a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. As this court often has said, it

> is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive.

Appellants also contend that because the State Belt Railroad is owned by the State of California and operated by Commissioners appointed by that State, and because it is not intended to earn a profit, it can not be *engaged in commerce.* They assert that regardless of the character of the State Belt Railroad if privately operated, it can not be held to engage in interstate commerce when operated by the State. But clearly, whether or not a railroad is engaged in commerce is determined by what it does and not by reference to the character of the owner of its property. A State may through its agents engage in a private business enterprise. *South Carolina* v. *United States,* 199 U. S. 437. And a State is not precluded by its sovereign character from operating through its agents a railroad, in which event the enterprise becomes a "private undertaking." *Georgia* v. *Chattanooga,* 264 U. S. 472, 481. Its purpose in either case must be related to some governmental function, but such purpose does not change the actual nature of the activity which it undertakes.

In *South Carolina* v. *United States, supra,* this Court held that where a State undertakes to control the sale of liquor by the dispensary system it engages in ordinary private business, which is not, by the mere fact that it is being conducted by a State, exempted from the operation of the taxing

power of the Federal Government. In that case this Court said (pp. 454, 455):

> Mingling the thought of profit with the necessity of regulation may induce the State to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal-revenue tax. If one State finds it thus profitable, other States may follow, and the whole body of internal-revenue tax be thus stricken down.
>
> More than this. There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed public utilities, including not merely therein the supply of gas and water, but also the entire railroad system. * * *
>
> We may go even a step further. There are some insisting that the State shall become the owner of all property and the manager of all business. * * * If this change should be made in any State, how would that State contribute to the revenue of the Nation? * * *
>
> Obviously, if the power of the State is carried to the extent suggested, and with it is relief from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to

> practically destroy the efficiency of the National Government. * * * .

The paramount power of Congress with respect to the regulation of interstate commerce is elementary. If a State may not interfere directly with the operation of this paramount authority, it can not do so indirectly merely by taking over the operation of the instrumentalities of that commerce. Carried to its logical conclusion, the appellants' contention would result in the automatic loss of control by the Federal Government over all instrumentalities of interstate commerce which the State sees fit to acquire and operate. We submit that whether the State Belt Railroad is a common carrier engaged in interstate commerce must be determined by the nature of the actual railroad operations carried on without regard to the fact that the railroad is owned and operated by the State of California.

In *Mathewes* v. *Port Utilities Commission,* 32 F. (2d) 913 (E. D. So. Car.), it was held that a railroad operated by the Port Utilities Commission of the City of Charleston was a common carrier engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. In *McCallum* v. *United States,* 298 Fed. 373 (C. C. A. 9th), certiorari denied, 266 U. S. 606, the State Belt Railroad, on substantially the same facts as those here presented, was held to be a common carrier engaged in interstate commerce within the meaning of the Safety Appliance Act.

II

THE SUIT AGAINST APPELLANTS IS NOT A SUIT AGAINST THE STATE OF CALIFORNIA, AND APPELLANTS AS THE OPERATORS OF THE STATE BELT RAILROAD ARE LIABLE FOR VIOLATIONS OF THE SAFETY APPLIANCE ACT COMMITTED IN THEIR OPERATION OF THAT RAILROAD

Under many circumstances a suit against an officer of a State with respect to acts undertaken by virtue of his office is not a suit against the State. Thus a suit to restrain a State officer from enforcing an unconstitutional State statute or a constitutional State statute in an unconstitutional manner is not a suit against the State. *Ex Parte Young,* 209 U. S. 123, 150, 155; *Truax* v. *Raich,* 239 U. S. 33, 37; *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362, 390–391. A suit against a State officer to recover damages caused by his failure to perform properly his official duties is not a suit against the State. *Johnson* v. *Lankford,* 245 U. S. 541. The basis for these holdings is that a State can not confer upon an agent authority to commit a tort so as to excuse the perpetrator; in such case the law of agency has no application; the wrongdoer is treated as the principal and is held individually liable for the damages inflicted. *Hopkins* v. *Clemson College,* 221 U. S. 636, 643. Upon the same principle the exemption of the United States from judicial process does not protect its officers and agents from being personally liable in tort to any person whose property rights have been wrong-

fully invaded, even by authority of the United States. *Belknap* v. *Schild,* 161 U. S. 10, 18.

Upon the authority of these and like cases the Circuit Court of Appeals for the Ninth Circuit in *McCallum* v. *United States,* 298 Fed. 373, certiorari denied, 266 U. S. 606, *supra,* held that a suit by the United States against the members of the Board of State Harbor Commissioners of the State of California to recover penalties for violations of the Safety Appliance Act committed in the operation of the State Belt Railroad was not a suit against the State of California and that the United States could recover against the Commissioners. The court in that case said (p. 374):

> It is conceded that the board is an agency of the state, and that as such it conducts the business of the state on the water front and manages the State Belt Railroad. But this is not a case in which the members of the board were acting within the power and duty vested in them by law, or in pursuance of authorization from the state. It is an action in tort to recover penalties for wrongful acts committed in violation of a law of the United States, not by the State, but by individuals acting as its servants. The state could not and did not authorize the commission of such wrongful acts, and immunity of the state from suit does not relieve state officers from responsibility for their unlawful action.

The Circuit Court of Appeals for the Ninth Circuit reaffirmed this decision in *Tilden* v. *United States,* 21 F. (2d) 967.

In light of the above authorities the contention of the appellants that "an action by or against a State officer as such is an action by or against the State" is, we submit, not sustained. Appellants cite on this point *Kentucky* v. *Dennison,* 24 How. 66, *In re Ayers,* 123 U. S. 443, and *Smith* v. *Reeves,* 178 U. S. 436. *Kentucky* v. *Dennison* was a proceeding on behalf of the State of Kentucky "by the direction and in the name of the Governor of the State" for a writ of mandamus against the Governor of Ohio to cause the latter to remove a fugitive of justice from Ohio to Kentucky. Although this Court held it had no authority to issue the writ, it said in that case that where the chief magistrate of a State is sued entirely in his official character the State itself might be considered a party on the record. This statement was apparently based on the practice then existing of bringing actions on behalf of a State in the name of the Governor (24 How. 66, 97) and is obviously not applicable to proceedings against other State officers. The other two cases cited held that suits brought against officers of the State where the State, though not named, was the real party against which the relief was sought and the judgment would operate, were proceedings against the State. Thus *Smith* v. *Reeves,* 178 U. S. 436, was a suit commenced in

the Circuit Court of the United States against the Treasurer of the State of California to recover the amount of certain taxes paid to the Treasurer, together with interest thereon, and was based on a statute of California permitting suit in the State court against the State Treasurer to recover taxes illegally assessed. In holding that the suit could not be maintained, this Court said (pp. 438–439):

> Although the State, as such, is not made a party defendant, the suit is against one of its officers *as Treasurer;* the relief sought is a judgment against that officer *in his official capacity;* and that judgment would compel him to pay out of the public funds in the treasury of the State a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the State for the amount specified in the complaint.

In *Smith* v. *Reeves* the State Treasurer had not done, or permitted to be done, anything outside the scope of his official duties. He had received certain taxes payable to him under the laws of the State. The liability for these taxes, if erroneously assessed, was a liability created by the laws of California chargeable against State funds. In the instant case, on the other hand, the suit is to enforce a liability created by a law of the United States and the wrong doing alleged—permitting cars to move in interstate commerce with apparatus not conforming with the standards prescribed by the

Safety Appliance Act—was not sanctioned by the State law. The judgment entered by the District Court was against the appellants individually and in the enforcement of this judgment no relief against the State will be necessary. To hold that under such circumstances appellants' wrong doing was the wrong doing of the State of California would be, as this Court said in *Johnson* v. *Lankford, supra,* p. 545, to assert that "whatever an officer does, even in contravention of the laws of the State, is State action, identifies him with it and makes the redress sought against him a claim against the State."

Although appellants were the duly qualified and acting State Harbor Commissioners during the times mentioned in the complaint, they had been succeeded in office by new Commissioners prior to the trial of the case. (R. 24–25, 39–40.) The fact that the District Court entered judgment against the appellants after they had ceased to be officers of the State is further evidence that the suit was regarded as one against the appellants individually.

Appellants contend that if the suit is not against the State of California, but against the appellants individually, they are not within the term "common carrier" as used in the Safety Appliance Act. *United States* v. *Nixon,* 235 U. S. 231, *supra,* held that a receiver operating a railroad under judicial appointment, was a "common carrier" within the meaning of the Quarantine Act of 1905, as amended

in 1913, and that as such common carrier the receiver was liable for the penalties prescribed for violation of the Quarantine Act. There seems no valid distinction between a receiver, who operates the property of a railroad company through appropriate agents, and appellants, who operated the property of the State Belt Railroad through a superintendent appointed by them and under their supervision and control. (R. 26.) We submit that appellants as the operators of the State Belt Railroad were a "common carrier" within the meaning of the Safety Appliance Act and that they did not cease to be within the Act because in the course of their operation a statutory liability was incurred which the State of California as the owner of the railroad property had not authorized.

Appellants also contend that they can not be held liable for violations of the Safety Appliance Act which occurred without their personal knowledge, against their consent and contrary to their orders and instructions. They rely on the holding in *Robertson* v. *Sichel,* 127 U. S. 507, that a public officer who is not personally guilty of negligence is not liable in an action for damages caused by the negligence of a subordinate officer.

We submit that the doctrine of *Robertson* v. *Sichel* is inapplicable here because the Safety Appliance Act imposes an absolute liability upon the carrier which is not dependent on the common law rule of reasonable care or the common law rule of liability of the principal for the acts of his agent.

St. Louis & Iron Mountain Ry. v. *Taylor,* 210 U. S. 281, was a suit against a corporation operating a railroad to recover damages for the death of one of its employees and the right of recovery was based solely on the defendant's failure to equip certain cars as required by the Safety Appliance Act. This Court held that the common law rule of reasonable care was not a defense where the cars used were not equipped as required by the Safety Appliance Act. It said (pp. 294–295):

> In the case before us the liability of the defendant does not grow out of the common law duty of master to servant. The Congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the duty by statute. * * * The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just.

In *Chicago, Burlington & Quincy Ry.* v. *United States,* 220 U. S. 559, this Court held that proof that a carrier had exercised reasonable care both in equipping its cars and in inspecting them was no defense to an action to recover penalties for violating the Safety Appliance Act.

The appellants further contend that the United States does not possess the power to fine or penalize officers of sovereign States for acts occurring in the regular performance by them of a governmental function. In support of this contention appellants

cite cases holding that State officers and agencies are not subject to Federal taxation. But this Court has held that the exemption of State agencies and instrumentalities from national taxation is limited to those which are strictly of a governmental character and does not extend to those used by the State in carrying on an ordinary private business. *South Carolina* v. *United States,* 199 U. S. 437, *supra.* In that case the Court held that where the State of South Carolina in the exercise of its police power had undertaken the control of the sale of all liquor in the State, it was engaging in an ordinary private business which was not exempted from the operation of the Federal taxing power.

If the Federal Government under its taxing power may tax State agencies and officers who are engaged in ordinary private business, it would seem to follow that under its commerce power it may fine or penalize State officers when they are engaged in interstate commerce. *Mathewes* v. *Port Utilities Commission,* 32 F. (2d) 913 (E. D. So. Car.), *supra,* held that Congress may make a municipality of a State liable for the torts of its agents when it is engaged in interstate commerce.

There is no evidence in the record, and it is not suggested by the appellants, that to require the State Belt Railroad to comply with the Safety Appliance Act would interfere with or impair the efficiency of the appellants in performing the functions which they are designed to perform or that

it would hinder the efficient exercise of any governmental function of the State of California. The paramount power of the Federal Government with respect to the regulation and control of interstate commerce is not lost, we submit, merely by virtue of the State taking over the instrumentalities of that commerce.

The appellants allege that to hold the State Harbor Commissioners personally liable for violations of the Safety Appliance Act would make it impossible to find competent persons to act as Commissioners. The suggested difficulty appears largely fanciful. This Court denied certiorari in *McCallum* v. *United States, supra,* on or before January 12, 1925. (266 U. S. 604, 606.) Nothing in the statement of facts filed in the present case on July 25, 1928 (R. 24), indicates that in the three and a half years intervening the State of California has experienced difficulty in obtaining competent Commissioners.

On the other hand, the purpose of Congress in enacting this legislation must be kept in mind. The Safety Appliance Act was obviously intended to minimize accidents and injuries to employees of all railroads engaged in interstate commerce irrespective of their ownership. There is no reason to suppose that Congress in enacting the Safety Appliance Act was less solicitous of the safety of the life and limb of employees of a common carrier

owned and operated by a State than it was of the employees of a carrier privately operated, or that it intended to exempt from the former the protection which it gave the latter.

In *Johnson* v. *Southern Pacific Co.,* 196 U. S. 1, 17, this Court said that the primary object of the Safety Appliance Act was to promote the public welfare by securing the safety of employees and travelers and that this remedial aspect of the Act was more dominant than the punitive aspect involved in the $100 penalty provision recoverable in a civil action. In *Chesapeake & O. Ry. Co.* v. *United States,* 249 Fed. 805, 807 (C. C. A. 6th), certiorari denied, 248 U. S. 580, the court said that the Safety Appliance Act "being remedial and humanitarian in its purpose, is broadly construed."

III

ASSUMING THAT THIS IS A SUIT AGAINST THE STATE OF CALIFORNIA, THE SAFETY APPLIANCE ACT APPLIES TO THE OPERATIONS OF THE STATE BELT RAILROAD AND GIVES THE UNITED STATES DISTRICT COURT JURISDICTION OF THE SUIT

Appellants, alleging that this is a suit against the State of California, contend that the Safety Appliance Act does not apply to a State. *Guarantee Company* v. *Title Guaranty Co.,* 224 U. S. 152; *United States* v. *Herron,* 20 Wall. 251; *In re Fowble,* 213 Fed. 677 (D. Md.); and *Sullivan* v. *School District,* 179 Wis. 502, are cited as holding that a sovereign is not bound by the words of a

statute unless named therein. Each of these cases involved the application of a statute *against the enacting sovereign.* *United States* v. *Herron, supra,* p. 255, and *Dollar Savings Bank* v. *United States,* 19 Wall. 227, 239, point out that the historical basis for the principle relied upon by appellants is to be found in the English practice, where the Crown is held to be unaffected by legislation not specifically directed against it. The cases cited clearly indicate that the rule of statutory construction upon which appellants rely applies only to the enacting sovereign.

Assuming that a suit to recover penalties for violations of the Safety Appliance Act committed in the operation of the State Belt Railroad is a suit against the State of California, the Safety Appliance Act applies to "any common carrier" engaged in interstate commerce, and a common carrier owned and operated by a State is therefore within the express terms of the Act. No rule of statutory construction calls for a different result. Considerations of the purpose of Congress in enacting this legislation and of the liberal construction to be given this remedial statute (*supra,* pp. 29–30) also lead to the conclusion that the Safety Appliance Act applies to the operators of the State Belt Railroad.

Appellants contend that if the suit is against the State of California, the United States District Court had no jurisdiction.

Article III, Section 2, Clause 2, of the Constitution provides:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

In *Ames* v. *Kansas,* 111 U. S. 449, *supra,* this Court held that under the foregoing provision of the Constitution the jurisdiction of this Court was not exclusive and that Congress could give a lower Federal court jurisdiction of a case in which a State was a party plaintiff although the State contested removal of the case to a lower Federal court, as authorized in a removal Act adopted by Congress. The basis for the decision was the construction which Congress, within six months after the inauguration of the Government under the Constitution, placed upon this constitutional provision in the Judiciary Act of 1789. Section 13 of that Act, c. 20, 1 Stat. 73, 80, now Section 233 of the Judicial Code (U. S. C., Title 28, sec. 341), provides:

> That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other

> states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party. * * *

The Constitution thus gave this Court original jurisdiction in all cases in which a State "shall be party" and the Judiciary Act of 1789 followed this terminology in providing that in all civil controversies where a State "is a party" this Court shall have *exclusive* jurisdiction in certain such cases and *original,* but not *exclusive,* jurisdiction in other such cases.

We submit that Congress, having power under the Constitution to give the lower Federal courts jurisdiction of a suit against a State, has by Section 6 of the Safety Appliance Act given the District Court jurisdiction of the present cause of action, even if it is regarded as a suit against the State of California. Section 6 of the Safety Appliance Act, as amended, pp. 36–37, *infra,* provides a $100 penalty for a violation of any of the provisions of that Act—

> to be recovered in a suit or suits to be brought by the United States district attorney in the

> district court of the United States having jurisdiction in the locality where such violation shall have been committed.

This section in terms applies to all suits brought to recover such penalties, and the exclusion of such suits if a State-operated railroad is involved seems unwarranted. Congress would scarcely have required that this Court be vested with original jurisdiction of suits to collect penalties for minor infractions of the Safety Appliance Act. Moreover, the statutory liability created is recoverable only by a suit in a District Court. If suits for penalties against Commissioners operating a State-owned railroad are regarded as suits against the State, denial of the jurisdiction of the District Court would mean that although Congress had created a penalty for violations occurring in the operation of such a railroad, it did not give any court jurisdiction to enforce the penalty.

Assuming that this suit is one against the State of California, we submit that the provisions of Section 6 of the Safety Appliance Act giving United States District Courts exclusive jurisdiction of suits to recover the penalties therein provided must be regarded as modifying the prior general provisions of Section 233 of the Judicial Code in all cases where a common carrier engaged in interstate commerce, but owned and operated by a State, has been guilty of an infraction of the Safety Appliance Act.

CONCLUSION

It is respectfully submitted that the judgment of the District Court should be affirmed.

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OCTOBER, 1930.

APPENDIX A

STATUTES INVOLVED

The Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531 (U. S. C., Title 45, Secs. 1, 2, and 6), provides in part as follows:

> SEC. 1. That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad * * *.
>
> SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.
>
> * * * * *
>
> SEC. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this Act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such

> district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge: *Provided,* That nothing in this Act contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs. (As amended by the Act of April 1, 1896, c. 87, 29 Stat. 85.)

The Act of March 2, 1903, c. 976, 32 Stat. 943 (U. S. C., Title 45, Sec. 8), amended the Safety Appliance Act of March 2, 1893, by enacting that the "provisions and requirements" of the latter Act "shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type."

The Act of April 14, 1910, c. 160, 36 Stat. 298 (U. S. C., Title 45, Secs. 16, 11, 12, and 13), supplementing the Safety Appliance Act of March 2, 1893, provides in part as follows:

> SEC. 1. That the provisions of this Act shall apply to every common carrier and every vehicle subject to the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three, commonly known as the "Safety Appliance Acts."

SEC. 2. That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line any car subject to the provisions of this Act not equipped with appliances provided for in this Act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand holds or grab irons on their roofs at the tops of such ladders: *Provided,* That in the loading and hauling of long commodities, requiring more than one car, the hand brakes may be omitted on all save one of the cars while they are thus combined for such purpose.

SEC. 3. That within six months from the passage of this Act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this Act * * *. Said commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of draw bars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission.

SEC. 4. That any common carrier subject to this Act using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this Act not equipped as provided in this Act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in section six of the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six: * * *.

APPENDIX B

An order of the Interstate Commerce Commission, dated October 10, 1910, with respect to the standard height of drawbars provides:

> Whereas by the third section of an act of Congress approved April 14, 1910, entitled "An act to supplement 'An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes', and other safety appliance acts, and for other purposes," it is provided, among other things, that the Interstate Commerce Commission is hereby given authority, after hearing, to modify or change and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and
>
> Whereas a hearing in the matter of any modification or change in the standard height of drawbars was held before the Interstate Commerce Commission at its office in Washington, D. C., on June 7, 1910,

Now, therefore, in pursuance of and in accordance with the provisions of said section 3 of said act,

It is ordered, That (except on cars specified in the proviso in section 6 of the safety appliance act of March 2, 1893, as the same was amended April 1, 1896) the standard height of drawbars heretofore designated in compliance with law is hereby modified and changed in the manner hereinafter prescribed, to wit: The maximum height of drawbars for freight cars measured perpendicularly from the level of the tops of rails to the centers of drawbars for standard-gauge railroads in the United States subject to said act shall be 34½ inches, and the minimum height of drawbars for freight cars on such standard-gauge railroads measured in the same manner shall be 31½ inches, and on narrow-gauge railroads in the United States subject to said act the maximum height of drawbars for freight cars measured from the level of the tops of rails to the centers of drawbars shall be 26 inches, and the minimum height of drawbars for freight cars on such narrow-gauge railroads measured in the same manner shall be 23 inches, and on 2-foot-gauge railroads in the United States subject to said act the maximum height of drawbars for freight cars measured from the level of the tops of rails to the centers of drawbars shall be 17½ inches, and the minimum height of drawbars for freight cars on such 2-foot-gauge railroads measured in the same manner shall be 14½ inches.

And it is further ordered, That such modification or change shall become effective and obligatory December 31, 1910.

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